

ARKANSAS SUPREME COURT

No. CR 08-45

ANTHONY D. WHITE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered April 23, 2009

PRO SE APPEAL FROM THE
CIRCUIT COURT OF GRANT
COUNTY, CR 2005-85, HON.
PHILLIP H. SHIRRON, JUDGE

AFFIRMED.

PER CURIAM

A jury convicted appellant Anthony D. White of possession of cocaine, simultaneous possession of drugs and firearms, and possession of a firearm by a felon and sentenced him as an habitual offender to an aggregate term of 1320 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *White v. State*, CACR 06-799 (Ark. App. Apr. 25, 2007). Appellant timely filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, which was denied. Appellant filed in this court a motion for belated appeal of the order denying postconviction relief that we granted. *White v. State*, 373 Ark. 415, ___ S.W.3d ___ (2008) (per curiam). The parties have now filed their briefs and the matter is before us.

Appellant raises six points on appeal, as follows: (1) the trial court erred in determining trial counsel was not ineffective for failing to move for suppression of the evidence due to the fact that appellant had not been tried on charges of speeding and driving on a suspended license; (2) the trial

court erred in determining that trial counsel was not ineffective for failure to investigate defective record keeping concerning suspension of appellant's driver's license; (3) the trial court erred in determining that trial counsel was not ineffective for failure to challenge the basis for an inventory search that resulted in discovery of the weapon at issue; (4) the trial court erred in failing to find that running the sentences on each of the charges consecutively violated the prohibition against double jeopardy; (5) the trial court erred in failing to find that one of the convictions used for purposes of enhancement was invalid; (6) the trial court erred by failing to provide an order that adequately identified the portions of the record relied upon to support its findings. The trial court found that the issues concerning the searches should have been resolved at trial and the court of appeals upheld the searches as valid, that consecutive sentences did not violate double jeopardy requirements, and that any claims concerning record keeping were invalid.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006) (per curiam). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam).

Appellant's first three points allege ineffective assistance of counsel. In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Small*, 371 Ark. at 250, 264 S.W.3d at 515. Under the *Strickland* test, a claimant must show that counsel's performance

was deficient, and the claimant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam).

Each of appellant's claims of ineffective assistance fails because appellant does not demonstrate that, had trial counsel not committed the alleged error, had he raised the objections or conducted an investigation as appellant asserts counsel failed to do, any prejudice would have resulted. Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Appellant must have alleged in the petition that counsel should have presented meritorious objections, because counsel is not ineffective for failing to make an argument that is meritless. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Counsel is presumed effective and allegations without factual substantiation are insufficient to overcome that presumption. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

Appellant's first claim of ineffective assistance alleged that counsel did not move to suppress the evidence on the basis that appellant had not been tried on charges of speeding and driving on a suspended license. Appellant asserted in his petition that counsel should have made an argument for suppression based upon a theory that the traffic stop was pretextual and without probable cause because appellant would not have been found guilty if tried on the traffic charges. Whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation which the officer believed to have occurred. *Stokes v. State*, ___ Ark. ___, ___ S.W.3d ___ (Jan. 22, 2009). Appellant's proposed argument for suppression was without merit.

For similar reasons, appellant's second argument fails. Had counsel investigated the

allegedly defective record keeping concerning appellant's suspended license, any evidence produced would not have affected the outcome of the suppression hearing because the accuracy of that information had no bearing upon the issue of probable cause for the traffic stop. Appellant's petition failed to set forth factual substantiation to demonstrate prejudice.

In appellant's third claim of ineffective assistance, he again failed to demonstrate prejudice because he did not identify a basis upon which counsel might have successfully challenged the inventory search. Although appellant contends the search was conducted on the basis of his consent and argues the search should only have been conducted at the site of his arrest, he admits that the testimony was that the search was conducted as an inventory search following appellant's arrest by the officer at the wrecking yard where appellant's car was towed. Appellant asserts that had counsel been aware that the search was conducted after his arrest, he could have sought to suppress the evidence discovered. But, a police officer may conduct a warrantless inventory search of a vehicle that is being impounded in order to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Benson v. State*, 342 Ark. 684, 30 S.W.3d 731 (2000). Appellant's petition did not identify a meritorious basis upon which counsel might have challenged the inventory search.

Next, appellant asserts error because the trial court did not find his consecutive sentences violated the prohibition against double jeopardy. Appellant concedes that he could be convicted of all three charges, but argues that to run the sentences consecutively rather than concurrently violates the prohibition against double jeopardy because the charges have an element in common. The imposition of consecutive sentences, however, does not place a defendant in double jeopardy. *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328 (1980).

We need not address appellant's claim that the trial court erred in failing to determine that postconviction relief was warranted based upon the use of a conviction that was later overturned for enhancement purposes because appellant failed to receive a ruling as to that issue. An appellant has an obligation to obtain a ruling on any issue to be preserved for appeal. See *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). Moreover, we note that, for purposes of sentence enhancement, a conviction is final when the judgment is pronounced. *Birchett v. State*, 291 Ark. 379, 724 S.W.2d 492 (1987).

In appellant's final point on appeal, he contends the trial court failed to comply with Arkansas Rule of Criminal Procedure 37.3(a) in that the order did not sufficiently identify the portions of the record relied upon. Although brief, the order did point to the portions of the record relied upon for the basis of each ruling. In any case, as we have now addressed each of appellant's claims in the petition, it is clear that the petition was without merit. This court will affirm the denial of a Rule 37.1 petition notwithstanding the circuit judge's failure to make written findings where it can be determined from the record that the petition is wholly without merit or where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Reed v. State*, 375 Ark. 277, ___ S.W.3d ___ (2008). We therefore affirm the trial court's denial of postconviction relief in this case.

Affirmed.